LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 23 1954
HAROLD B. WILLEY, Clerk

No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

SIMON E. SOBELOFF,
Solicitor General,

WARREN E. BURGER,
Assistant Attorney General,

OSCAR H. DAVIS,
Special Assistant to the Attorney General,

MELVIN RICHTER,
JULIAN H. SIROMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Question presented	2
Statement	2
Summary of Argument	8
Argument:	
Introduction	12
I. The holding that contract renegotiability is barred from appellate review is not required by this Court's decisions and is contrary to prior rulings of the District of Columbia Circuit	15
A. The ruling below is not required by *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540	16
B. The decision below is inconsistent with the prior rulings of the District of Columbia Circuit	24
II. There is good ground for sustaining appellate review by the District of Columbia Circuit of constitutional and jurisdictional issues arising from Tax Court renegotiation decisions	36
Introductory	36
A. The statute	41
1. The specific wording of the "finality" clause	43
2. Propriety of review by a constitutional court	49
3. Mechanism for court review	53
B. Legislative history	56
C. Scope of review	68
Conclusion	69
Appendix	71

CITATIONS

Cases:

	Page
Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U.S. 752	9, 21, 22, 51
American School of Magnetic Healing v. *McAnnulty*, 187 U.S. 94	51
Armstrong v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U.S. 967	9, 31, 28, 30, 33
Auffmordt v. *Hedden*, 137 U.S. 310	50
Blanchard Mach. Co. v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912,	9, 13, 14, 26, 29, 30, 31, 33, 38, 63
Board of Governors v. *Agnew*, 329 U.S. 441	51
Brown & Williamson Tobacco Corp. v. *United States*, 201 F. 2d 819	42
Butte, A. & P. Ry. v. *United States*, 290 U.S. 127	50
Crane v. *Hahlo*, 258 U.S. 142	51
Dakota Central Tel. Co. v. *South Dakota*, 250 U.S. 163	51
Decatur v. *Paulding*, 14 Pet. 497	50
Dickinson v. *United States*, 346 U.S. 389	52
Dobson v. *Commissioner*, 320 U.S. 489	51
Dorsheimer v. *United States*, 7 Wall. 166	50
Eastern Machinery Co. v. *Under Secretary of War*, 182 F. 2d 99	26, 30, 33
Ebco Mfg. Co. et al. v. *Secretary of Commerce* (C.A. 6, No. 12,288)	40
Eberlein v. *United States*, 257 U.S. 82	50
Estep v. *United States*, 327 U.S. 114	51, 52
Fogarty v. *United States*, 340 U.S. 8	66
Forest Glen Creamery Co. v. *Commissioner of Internal Revenue*, 123 F. 2d 522	34
French v. *War Contracts Price Adjustment Board*, 182 F. 2d 560	13, 38, 40, 42, 54
Gale, Estate of, et al. v. *United States* (C.A.D.C. No. 11906)	14
Hadden v. *Merritt*, 115 U.S. 25	50

Cases—Continued

Page

Hanlon-Waters, Inc. v. *United States* (C.A.D.C. No. 11934) 14
Heikkila v. *Barber*, 345 U.S. 229..... 51, 52
Heiner v. *Diamond Alkali Co.*, 288 U.S. 502..... 51
Hilton v. *Merritt*, 110 U.S. 97..... 51
Howell Electric Motors Co. v. *United States*, 172 F. 2d 953 ..... 42, 63
Keller v. *United States*, 207 F. 2d 610, certiorari denied, 347 U.S. 918..... 34
Knowles v. *Hirsch*, 65 F. Supp. 690..... 20
Knu-Vise, Inc. v. *War Contracts Price Adjustment Board*, 195 F. 2d 198..... 27, 33
Lichter, Jacob v. *United States, et al.* (C.A.D.C. No. 11925) 14
Lichter v. *United States*, 334 U.S. 742, 9, 16, 21, 23, 26, 27, 42, 47, 56, 57, 63
Lincoln Electric Co. v. *Knox*, 56 F. Supp. 308..... 57
Lincoln Electric Co. v. *Knox*, 77 F. Supp. 444, affirmed *sub nom. Lincoln Electric Co.* v. *Forrestal*, 334 U.S. 841..... 57, 63
Lipke v. *Lederer*, 259 U.S. 557..... 51
Lowell Wool By-Products Co. v. *War Contracts Price Adjustment Board*, 192 F. 2d 405, 10, 12, 28, 31, 32, 33
Macauley v. *Waterman S.S. Corp.*, 327 U.S. 540, 5, 7, 8, 13, 15, 17-19, 20, 30
Maguire Industries v. *Secretary of War*, 185 F. 2d 434 27-28
Marie & Alex Manoogian Fund v. United States, 212 F. 2d 369..... 40, 63
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 20
Old Colony Trust Co. v. *Commissioner*, 279 U.S. 716 49
Order of Railway Conductors v. *Swan*, 329 U.S. 520 51
Passavant v. *United States*, 148 U.S. 214..... 51
Perkins v. *Lukens Steel Co.*, 310 U.S. 113..... 50
Psaty & Fuhrman v. *Stimson*, 182 F. 2d 985..... 34

Cases—Continued

Page

Reynolds v. *United States*, 292 U.S. 443..... 50, 51
Ring Construction Corp. v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943, 13, 27, 29, 30, 31, 33, 38, 63
St. Joseph Stockyards Co. v. *United States*, 298 U.S. 38..... 51
Shields v. *Utah Idaho C.R.*, 305 U.S. 177..... 51
Slater v. *Peyser*, 200 F. 2d 360..... 35
Social Security Board v. *Nierotko*, 327 U.S. 358.... 52
Spaulding v. *Douglas Aircraft*, 154 F. 2d 419..... 42, 63
Stark v. *Wickard*, 321 U.S. 288..... 51
State of New York, Ex parte, 256 U.S. 503..... 6
Switchmen's Union of North America v. *National Mediation Board*, 320 U.S. 297..... 50
Texas & P. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426..... 20
United States v. *Bonnell*, 180 F. 2d 145..... 42, 63
United States v. *Williams*, 278 U.S. 255..... 50
United States v. *Wissahickon Tool Works*, 200 F. 2d 936..... 40, 42
United States v. *Martin Wunderlich Co.*, 211 F. 2d 433..... 14, 34
United States ex rel. Carey v. *Keeper of Montgomery County Prison*, 202 F. 2d 267..... 35
U.S. Electrical Motors, Inc. v. *Jones*, 153 F. 2d 134..... 12, 15, 25, 27, 34, 38, 43
Wade v. *Stimson*, 65 F. Supp. 277, affirmed, 331 U.S. 793..... 20
Warner v. *War Contracts Price Adjustment Board*, 188 F. 2d 363..... 13, 38
Warner & Swasey Co. v. *Board of Directors, R.F.C.*, 170 F. 2d 164..... 27
Warner & Swasey Co. v. *War Contracts Price Adjustment Board*, 201 F. 2d 201, certiorari denied, 345 U.S. 924..... 26, 30, 31
Waterman S.S. Corp. v. *Land*, 151 F. 2d 292, reversed *sub nom. Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540..... 38
Williamsport Wire Rope Co. v. *United States*, 277 U.S. 551..... 50

Statutes:

	Page
Administrative Procedure Act, Sec. 10(b), 5 U.S.C. § 1009(b)	42
Internal Revenue Code of 1939:	
Sec. 1100	49
Sec. 1141	2, 6, 11, 43, 53, 54, 55, 56, 75
Sec. 1142	2, 25, 34
Internal Revenue Code of 1954:	
Sec. 7441	49
Sec. 7482	43
First Renegotiation Act of 1942, 56 Stat. 245, as amended, 50 U.S.C. App. 1191	4, 16
Sec. 403(a)	5, 9, 24, 29, 46, 71
Sec. 403(c)	25, 28, 44, 46, 72
Sec. 403(d)	46
Sec. 403(e)	5, 8, 11, 22, 41, 45, 46, 53, 73
Second Renegotiation Act of 1943 (Revenue Act of 1943, 58 Stat. 78)	16
Sec. 403(a)	46
Sec. 403(c)	46
Sec. 403(d)	46
Sec. 403(e)	17, 25, 46
Sec. 403(h)	46
Sec. 403(i)	46
Renegotiation Act of 1948, 62 Stat. 259, 50 U.S.C. App. 1193:	
Sec. 3(e)	55
Renegotiation Act of 1951, 65 Stat. 7, 50 U.S.C. App. 1211-33	61, 66
Sec. 106(a)(6)	67
Sec. 106(a)(8), added by P.L. 764, 83d Cong., 2d Sess.	67
Sec. 108	66
Reorganization Plan No. 21 of 1950, 64 Stat. 1273, 46 U.S.C. 1111, note	6
59 Stat. 294	60

Legislative Material:

	Page
88 Cong. Rec. 3584	65
89 Cong. Rec. 9927-8	47, 65
89 Cong. Rec. 9928-9	58
89 Cong. Rec. 9929-30	62, 64
89 Cong. Rec. 9934-5	63
89 Cong. Rec. 9935-6	58
89 Cong. Rec. 9936	63
89 Cong. Rec. 9944-5	47, 63, 65
90 Cong. Rec. 505-6	59
90 Cong. Rec. 531-5	59, 64
90 Cong. Rec. 1300-1	59
90 Cong. Rec. 1338-9	60
90 Cong. Rec. 1351	60
90 Cong. Rec. 1353-4	65
90 Cong. Rec. 1355	60
97 Cong. Rec. 586	61
97 Cong. Rec. 588	65
97 Cong. Rec. 594	61
Hearings Before Committee on Finance on Section 403 of Public Law 528, 77th Cong., 2nd Sess.:	
pp. 16-19	46-47
p. 21	48
p. 39	48
Hearings Before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess.:	
p. 49	58
p. 386	58
p. 613	58
p. 990	58
p. 999	58
p. 1000	58
p. 1015	58
p. 1016	58
p. 1017	58
p. 1026	58
p. 1028	58
p. 1032	58
p. 1070	58

Legislative Material—Continued

Page

Hearings Before Committee on Finance on H.R. 1724, 82nd Cong., 1st Sess., p. 71 ..... 61, 64

Hearings Before Committee on Ways and Means on H.R. 2324, H.R. 2698 and H.R. 3015, 78th Cong., 1st Sess., p. 139 48

Hearings Before Committee on Ways and Means on H.R. 2628, 79th Cong., 1st Sess.:

pp. 174-176 60
p. 222 60

Hearings Before Committee on Ways and Means on H.R. 2946, 81st Cong., 2nd Sess.:

p. 18 ..... 62, 66
p. 226 60

Hearings Before House Committee on Naval Affairs Pursuant to H. Res. 30, 78th Cong., 2nd Sess.:

p. 433 57
p. 517 57

Hearings Before Senate Committee on Appropriations on H.R. 6868, 77th Cong., 2nd Sess.:

pp. 35-40 65
pp. 85-7 65

H. Rept. No. 871, 78th Cong., 1st Sess.:

pp. 34-36 ..... 47, 56
p. 37 47
p. 76 57
p. 77 57
pp. 80-2 47

H. Rept. No. 1079, 78th Cong., 2nd Sess. 59
pp. 76-81 47

S. Rept. 10, Part 5, 78th Cong., 1st Sess.:

pp. 1-3 56

S. Rept. No. 627, 78th Cong., 1st Sess.:

p. 32 47
p. 34 59
pp. 104-6 47
pp. 109-110 59

Miscellaneous—Briefs and Memorandum:

	Page
Aircraft & Diesel Equipment Co. v. *Hirsch*, Oct. Term, 1946, No. 9. Brief for United States....	38
Blanchard Mach. Co. v. *R. F. C. Price Adjustment Board*, Oct. Term, 1949, No. 540, Brief for Respondent in Opposition	39
Keller v. *United States*, Oct. Term, 1953, No. 538, Brief for United States in Opposition.....	39
Land v. *Waterman S.S. Corp.*, Oct. Term, 1945, No. 435, Brief for petitioners	38
Lichter v. *United States*, Oct. Term, 1947, Nos. 105, 74 and 95, Brief for United States.....	38
Mine Safety Appliances Co. v. *Forrestal*, Oct. Term, 1945, No. 71, Brief for appellee.....	38
Ring Construction Corp. v. *Secretary of War*, Oct. Term, 1949, No. 656, Brief for respondent in opposition	39
Martin Wunderlich Co. v. *Secretary of War*, Oct. Term, 1952, No. 666, Mem. for respondent in opposition	39
Davis, Unreviewable Administrative Action, 15 F.R.D. 411 (July 1954)	31, 68
Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission...	48
War Contracts Price Adjustment Board, Final Report, Table II (1951).....	53
War Contracts Price Adjustment Board Regulations, 32 C.F.R., c. XIV (Supp. 1944), Parts 1604, 1605	47
War Department Price Adjustment Board, Principles, Policy and Procedure to Be Followed in Renegotiation, pp. 14-17 (1942).....	48

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 263

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals deferring action on the jurisdictional question (R. 326) is reported at 204 F. 2d 398; its subsequent opinion holding that it lacked jurisdiction (R. 335) is reported at 211 F. 2d 635. The opinion of the Tax Court (R. 278-302) is reported at 17 T. C. 1325.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1954 (R. 340). The timely motion of the United States and Secretary of Commerce for rehearing *en banc* was denied on March 12, 1954 (R. 341). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to and including August 9, 1954 (R. 342). The petition for a writ of certiorari was filed on August 6, 1954 and was granted on October 14, 1954 (R. 342). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Renegotiation Act of 1942 (56 Stat. 245, as amended, 50 U.S.C. App. 1191, *et seq.*), and of the judicial review provisions of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed., 1141, 1142) are set forth in the Appendix, *infra,* pp. 71-76.

QUESTION PRESENTED

Whether under the Renegotiation Act of 1942, as amended, the Court of Appeals for the District of Columbia Circuit has authority to review a decision in a renegotiation case by the Tax Court that a contract is not renegotiable because it was not made with a "Department" of the United States.

STATEMENT

The facts pertinent to the issue here raised may be briefly summarized as follows:

During April and May of 1941, the Maritime Commission, at the request of the President and in

an effort to coordinate shipping in the furtherance of the national defense effort, assembled 2,000,000 tons of merchant shipping (R. 234, 279). Because of the shortage of available ships, the Commission, in order to accomplish this task, assembled the required tonnage from intercoastal ships (R. 44). Included among the intercoastal ships so assembled was respondent's vessel, *Vermont* (R. 44, 280).

At that time, the British Government requested from the United States, under the Lend-Lease program, shipping facilities which it needed to transport war equipment and supplies for its North African campaign, then going badly against the allies. Pursuant to this request, the President authorized the Maritime Commission to negotiate with various shipowners, including representatives of respondent, in order to secure the necessary tonnage for this operation.[1] After numerous conferences during April and May 1951, Commission officials and the shipowners worked out the terms under which the *Vermont* and other vessels were to be chartered for the Red Sea operation, including the charter rates which the owners were to be paid.

During the course of the negotiations between the Commission officials and the shipowners, it was understood by all the negotiating parties, including

---

[1] This operation ultimately became known as the "Red Sea operation" because of the ultimate destination of the vessels. Cf. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 542. There are 12 additional Red Sea charter cases pending in the Tax Court involving more than $7,000,000 in excessive profits. In all, there were 93 Red Sea voyages by 22 shipowners, of whom 7 voluntarily repaid excessive profits of more than $3,000,000. It was administratively determined that two shipowners had not received excessive profits.

respondent, that the British Government would probably be the formally named charterer under the charters for this Red Sea operation (R. 284) and respondent's charter was actually signed by a representative of the British Ministry of War Transport (R. 24). Neither the British Government nor any of its agencies or representatives, however, took part in the negotiations with the shipowners on the terms of the charter of the *Vermont* or the other ships for the Red Sea program (R. 284) and the charter was not formally executed by the British Ministry of War Transport representative until after performance had begun by the sailing of the *Vermont* for Port Sudan on May 29, 1941 (R. 284-285). The Commission paid all bills and other obligations which arose under this charter directly to the shipowners from funds appropriated by the Congress of the United States (R. 105, 135, 143, 151), and the British Government did no more than certify to the Commission that the charter services had been performed (R. 134, 142, 150).

Full performance under respondent's charter was not completed until after April 28, 1942, the date on which Congress enacted the Renegotiation Act, 56 Stat. 245, 50 U. S. C. App. 1191. In accordance with the terms of this Renegotiation Act, as amended, the Chairman of the United States Maritime Commission, on November 27, 1943, commenced renegotiation proceedings with respondent in an effort to eliminate the excessive profits which respondent had realized from its Red Sea venture (R. 51-53). On March 31, 1949, a unilateral re-

negotiation order was issued determining that respondent had received $164,000 in excessive profits from its charter (R. 15-16).[2]

Respondent petitioned the Tax Court for redetermination of its excessive profits under Section 403(e)(2) of the Renegotiation Act, as amended, *infra*, pp. 74-75 (R. 4-14). Thereafter, it moved the Tax Court to consider first, from among the various issues raised by its petition, the issue whether the Red Sea contract was subject to renegotiation (R. 25-31). This issue turns on whether respondent's charter, although formally executed by the British Ministry of War Transport, was in fact with the Maritime Commission and so a renegotiable contract with a "Department" under Section 403(a) of the Renegotiation Act, as amended, *infra*, p. 71. The Tax Court granted this motion (R. 38),[3] and after a hearing on this issue,[4] the court concluded, one judge dissenting, that the charter was with the British Ministry of War Transport

---

[2] The delay in issuing this order was attributable, in some measure, to the institution of judicial proceedings by some of the shipowners, including respondent (R. 27), who sought to enjoin the administrative proceedings on the ground that the charters were not subject to renegotiation. This effort came to nought when this Court held that the failure to exhaust administrative remedies precluded judicial consideration of the issues attempted to be raised. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540.

[3] As a result of this severance, no issue as to the amount of excessive profits was presented to the Tax Court; the questions presented were restricted to a consideration of the jurisdiction of the Maritime Commission and the Tax Court to subject respondent's Red Sea charter to renegotiation.

[4] The Tax Court excluded from evidence (R. 277, 297) an Official Statement of the British Government, which petitioners had received through official government and diplomatic chan-

and not with the Commission, and therefore was not subject to renegotiation under the Act (R. 278-302).

Relying on prior decisions of the District of Columbia Court of Appeals (see *infra*, pp. 24 ff.), the Government filed a petition in that court (under Section 1141 of the Internal Revenue Code of 1939, 26 U.S.C., 1952 ed., 1141, *infra*, pp. 75-76) for review of the Tax Court's decision that respondent's Red Sea charter was not renegotiable (R. 302-305). Respondent moved to dismiss the petition on the ground that the court was without jurisdiction to pass on this issue (R. 318). After hearing argument on this motion, the court deferred decision thereon until the hearing on the merits (R. 333).[5] After further argument, the

---

nels, to the effect that when a representative of the British Government executed the charter it was understood "that His Majesty's Government in signing said charters were agents only" and "that the principal and real party in interest was the United States as represented by the United States Maritime Commission" (R. 272). This ruling appears to be contrary to *Ex parte State of New York*, 256 U.S. 503, and other persuasive rulings.

[5] The court simultaneously denied the Government's motion to remand the cause to the Tax Court with instructions to vacate its decision on the ground that since Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 46 U.S.C. 1111, note) had abolished the position of the Chairman of the Maritime Commission, the named respondent in the Tax Court, and had transferred his functions to the Secretary of Commerce, the proceeding had abated with respondent's failure to make timely substitution (R. 311-18, R. 326-32). However, the court went on to rule that, since the Secretary of Commerce had failed to appear in the proceeding before it, there might be an absence of proper parties, and allowed time for him to appear (R. 329-32). In accordance with this ruling, the Government moved to substitute the present petitioners for the Chairman of the Maritime Commission, which motion was granted (R. 333-4).

division of the court sitting on the case (Clark, Prettyman and Washington, J. J.) held that it lacked jurisdiction to pass on the question. Quoting from this Court's opinion in *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 544 [6] the opinion, written by Judge Prettyman, concluded (R. 338):

> The problem now before us is precisely the problem involved in that discussion. The Court said without qualification that what are

---

[6] The *Waterman* language quoted by Judge Prettyman is as follows (see R. 337-8).

> Just as in the *Myers* case [(303 U.S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403(e)(1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * *" Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and what are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act.

> and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable.

Petitioners' petition for rehearing by the Court of Appeals *en banc* was denied (R. 341).

SUMMARY OF ARGUMENT

I

Since 1946 the Court of Appeals for the District of Columbia Circuit has consistently ruled in several cases brought by contractors that it has power to review renegotiation decisions of the Tax Court on constitutional or "jurisdictional" issues, notwithstanding the finality provision in the 1942 Renegotiation Act, as amended.[7] In this case, the first renegotiation appeal by the Government, the Court of Appeals, relying on a misinterpretation of *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, and ignoring its own prior rulings, held that the Tax

---

[7] Section 403 (c) of the amended Renegotiation Act, *infra*, pp. 73-75, provides for *de novo* redetermination by the Tax Court of administrative findings of excessive profits, and declares that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

Court's ruling that respondent's Red Sea charter is not renegotiable was not open to judicial review.

A. Far from requiring such a result, this Court in the *Waterman* case expressly reserved decision on the question of the scope of judicial review of Tax Court renegotiation decisions once rendered, and, as made clear in *Lichter* v. *United States,* 334 U.S. 742, and *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, decided only issues relating to primary jurisdiction and exhaustion of the Tax Court remedy.

B. The decision below that the court was without authority to review the issue whether the course of dealing between respondent and the Maritime Commission culminated in a "contract * * * with the Departments" within the meaning of Section 403 (a) and (c) of the Renegotiation Act, is plainly inconsistent with the prior rulings of the Circuit. That court had already held that the issue of contract renegotiability was open to judicial scrutiny. See *e.g., Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board,* 177 F. 2d 727, certiorari denied, 339 U.S. 912, considering "as jurisdictional" the renegotiability of certain contracts with R.F.C. subsidiaries. The court had also reviewed other issues indistinguishable from the present one—whether a course of dealing between a steel salesman and government contractors constituted a "subcontract" under the Act (*Armstrong* v. *War Contracts Price Adjustment Board,* 194 F. 2d 875, certiorari denied, 343 U.S.

967), and whether certain corporations were subject to the Act because under "common control" (*Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405).

Moreover, the present problem is far different from the questions that the Court of Appeal has held non-reviewable—issues pertaining directly to the computation or appraisal of costs and excessiveness of profits, or relating to the procedures to be followed before the Tax Court and the renegotiating agencies. These are questions involved in the "determination" of the "amount" of excessive gain. The issue here is of a wholly distinct calibre; it goes to the primary question of whether the renegotiating agency and the Tax Court may even undertake the computation or appraisal of costs and profits.

II

The Government early and for some time urged that the Renegotiation Act precludes any judicial review of Tax Court renegotiation decisions. But when we re-examine the problem from the standpoint of 1955, in the declining stage of litigation, a change in our position is warranted. The anticipated flood of appeals has not materialized. The long-established pattern of review followed by the District of Columbia Circuit has proved acceptable to both Government and contractors. Those factors, together with certain legislative developments, seem to us to make it inappropriate at this time to change the basic standards of review adopted by

that Circuit. Analysis of the pertinent statutory and legislative materials shows nothing conclusive either way, but there is certainly good ground for sustaining review to the extent that it has been allowed in the District of Columbia.

A. The categorization of *issues* involved in renegotiation cases into reviewable jurisdictional or constitutional questions and non-reviewable "determination" questions finds support in a close examination of the text of the "finality" clause of Section 403(e) of the Act, which covers only the Tax Court's "determination" of the "amount of excessive profits". The internal structure of the Act seems to differentiate between an "order" or "decision"—which includes the whole of the adjudication—and the "determination" of "amount", which has the narrower compass of computation and appraisal of costs and profits. Since it is the Tax Court's special expertise which is being protected from encroachment, it would be appropriate to restrict the "finality" clause to those business and financial matters with which that tribunal is normally concerned.

Other phases of the Tax Court's decisions—not involving findings on costs, profits, or amounts—would be reviewable in ordinary course under former Section 1141(a) of the Internal Revenue Code, which provides in general terms for review by the courts of appeals of Tax Court rulings.

B. The legislative history of the Tax Court section of the Renegotiation Act contains no mention of the problem of judicial review of Tax Court re-

negotiation determinations, but it does show (a) some belief that the constitutional courts would pass on at least some issues under the Act, and (b) that the choice of the Tax Court as the tribunal to review the administrative findings of excessive profits was rested on its special competence and experience in business matters. It is therefore consistent with the legislative history to read the "finality" clause, along with the District of Columbia Circuit, as limited to such matters, and not as covering all aspects of the Tax Court decision. Without disapproving in any way of this view, of which it was aware, Congress enacted a new Renegotiation Act in 1951 with the same Tax Court provisions.

C. The District of Columbia Circuit's formulation of reviewable "jurisdictional" issues and unreviewable "non-jurisdictional" issues—discussed in detail in Point I—is workable and should not be disturbed, if the Court agrees that some measure of review of non-constitutional questions is permitted.

ARGUMENT

Introduction

The Court of Appeals for the District of Columbia Circuit has, over the Government's initial opposition, repeatedly insisted since 1946 that it has power to review Tax Court renegotiation decisions on constitutional and "jurisdictional" grounds.[8] Since the great bulk of the holdings in this field are by the District of Columbia Court of

---

[8] *E.g., U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjust-*

Appeals,[9] and the law in that court had become so firmly established by frequent reiteration and application, the Government sought review of the Tax Court's determination that the Red Sea charters were not renegotiable. As we show in detail below (*infra*, pp. 24 ff.), the appellate court's previous rulings on comparable issues justified the Government in believing that the issue was "jurisdictional" and therefore reviewable.

Nevertheless, in this instance—the first in which the Government has invoked the court's asserted jurisdiction—the division hearing the case departed from the court's heretofore consistent position. Mistakenly invoking language used by this Court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544, the panel held that the renegotiability of the charters is a question of "coverage" within the non-reviewable jurisdiction of the Tax Court. This deviation without express overruling of any prior

---

ment Board, 192 F. 2d 405; *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U.S. 967; *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912; *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943; see the Memorandum for Respondent in Opposition, *Martin Wunderlich Co.* v. *Secretary of War*, No. 666, Oct. Term, 1952.

[9] The exceptions are two Ninth Circuit decisions (*French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, and *Warner* v. *War Contracts Price Adjustment Board*, 188 F. 2d 363), in which that Court of Appeals held that Section 403(c)(1) of the Renegotiation Act, as amended, *infra*, pp. 73-74, foreclosed appellate review of Tax Court decisions. However, that court seems to suggest that Tax Court determinations may be collaterally attacked, on grounds similar to those recognized by the District of Columbia Court of Appeals, in the district court suits brought by the Government to recapture the excessive profits.

decision,[10] coupled with some expressions from a number of the other judges of the District of Columbia Court of Appeals indicating disagreement with the limited scope of review recognized in the instant case,[11] impelled the Government to seek the aid of this Court in steadying the future course of renegotiation adjudication in the District of Columbia Circuit.

In Point I, *infra*, pp. 15-36, we demonstrate first that this Court has not passed upon the issue of what renegotiation questions, if any, are reviewable on appeal from the Tax Court, but on the contrary has expressly reserved opinion. We then show that under the prior decisions of the District of Columbia Circuit the Tax Court's ruling on the renegotiability of respondent's contract is open to ap-

---

[10] In *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, the only other renegotiation appeal by the Government to that court, the District of Columbia Circuit, after first holding that it had power to review (see 345 U.S. 950), later held that the issue of timely commencement of renegotiation is non-jurisdictional and not reviewable. The court expressly overruled that phase of its decision in *Blanchard Machine Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912, in which it had held, on a contractor's appeal, that the issue was jurisdictional and reviewable. See *infra*, p. 34, fn. 27.

[11] These statements were made from the bench during the oral argument, subsequent to the decision here, of three Tax Court renegotiation cases appealed by the contractors. *Estate of Robert I. Gale, et al.* v. *United States of America*, C.A. D.C., No. 11,906 (argued April 14, 1954, before Edgerton, Miller, and Bazelon, JJ.); *Hanlon-Waters, Inc.* v. *United States*, C.A. D.C., No. 11,934 (argued May 12, 1954, before Miller, Bazelon, and Fahy, JJ.); *Jacob Lichter, et al.* v. *United States, et al.*, C.A. D.C., No. 11,925 (argued May 12, 1954, before Miller, Bazelon, and Fahy, JJ.). To date no decision has been forthcoming in any of these cases.

pellate review. Point II, *infra*, pp. 36-69, discusses the question, three times reserved by this Court, of whether there is any review of Tax Court renegotiation decisions on non-constitutional issues. The Court may wish merely to accept, without independent examination, the general formulation of limited scrutiny of the District of Columbia Circuit. But if the Court does go further, we present our position from the standpoint of 1955, looking toward the close of renegotiation litigation. The Government's initial fear of numerous, protracted, and burdensome appeals if review were allowed has not materialized. The general standards followed by the District of Columbia Circuit since the decision early in 1946 in *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, have proved workable and acceptable to other courts and to the Government, as well as to contractors generally. There is very substantial basis for this rule in the wording, purpose, and history of the Renegotiation Act. We suggest, therefore, that the Court may deem it appropriate, as we do, not to work any major change in the established rule at this relatively late stage of the renegotiation program.

I

The Holding That Contract Renegotiability Is Barred from Appellate Review Is Not Required by This Court's Decisions and Is Contrary to Prior Rulings of the District of Columbia Circuit.

The three-judge division hearing this case rested its judgment mainly on some language in this Court's opinion in *Macauley* v. *Waterman*

S. S. Corp., 327 U.S. 540, also a Red Sea charter case, which it held required it to rule that Tax Court decisions as to the renegotiability of a contract are not subject to appellate examination.[12] But in our view the panel not only read *Waterman* incorrectly, it also ignored, without attempting to overrule, prior decisions of its own court, rulings which for the most part were issued after *Waterman* and reached results contrary to that obtained here.

A. *The ruling below is not required by Macauley v. Waterman S. S. Corp., 327 U. S. 540*

According to the division below, the *Waterman* case holds that the Tax Court has final and unreviewable jurisdiction to decide whether contracts are renegotiable under the Renegotiation Act (R. 338):

> * * * The [Supreme] Court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this Court has no jurisdiction to review the decision

[12] The statute here applicable is the First Renegotiation Act, part of the National Defense Appropriation Act of 1942, as amended by the Second Renegotiation Act, part of the Revenue Act of 1943 (enacted February 25, 1944). The Second Renegotiation Act added, *inter alia*, the provisions for Tax Court review. Other amendments to the 1942 Act, extending its coverage and adding to the powers of the Secretaries, are also relevant. See *Lichter* v. *United States*, 334 U.S. 742, 772-4. The Act as partially reproduced in the Appendix appears with all relevant amendments.

> of the Tax Court upon the question whether the contract in controversy was or was not renegotiable. * * *

This conclusion is based on the Court's statement in *Waterman* (327 U. S. at 544) that:

> * * * Contrary to respondent's contention that this language [13] limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act.

But when these words are read in context and in conjunction with later decisions of the Court, it becomes plain that the Court did not pass upon the issues which are now before it. In this Court there is no controlling authority and these questions are, therefore, entirely open.

---

[13] The Court is specifically referring to the clause of Section 403 (c)(1) of the Second Renegotiation Act which provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits" (*infra*, p. 73).

1. The *Waterman* case did not involve an attempted review of a Tax Court renegotiation decision; the administrative proceedings which are necessary preliminaries to instituting suit in the Tax Court had not even been completed. The purpose of the district court action brought by the shipowner in that case was to obtain (1) a declaratory judgment that his Red Sea charters, similar to the present charter, were not renegotiable because made with the British Government and not with an agency named in the Renegotiation Act, and (2) an injunction prohibiting the continuation of the administrative proceedings. As a result, the sole issue before this Court was whether the district court had jurisdiction to grant the relief prior to the initiation and termination of the administrative proceeding. In holding that the district court lacked jurisdiction, the Court declared (327 U. S. at 544-5), immediately following the excerpt quoted by the division below:

> * * * In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case [*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41], the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.

In so holding the Court reversed the decision of the District of Columbia Circuit (151 F. 2d 292) which had held (as summarized in the opinion below, R. 337) "that the question thus presented [the renegotiability of the contracts] was jurisdictional and that, if there was no law compelling renegotiation of the contracts, the company was entitled to invoke the Declaratory Judgment Act," without completing the administrative renegotiation proceeding. This Court did *not* find error in the holding of the District of Columbia Circuit that the question presented was "jurisdictional", but rather held that the Renegotiation Act had granted to the Tax Court the "exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance." (327 U.S. at 544.) "*Whether it ever can do so or not,*" it could not decide that issue "*in the first instance.*"

Against this background, there can be little doubt that this Court's reference, stressed in the opinion below, to questions of coverage being within the exclusive jurisdiction of the Tax Court dealt solely with delineation of the matters committed to the original jurisdiction of the Tax Court to the exclusion of the district courts, and was not intended to treat the scope of review once the Tax Court had made its determination. In other words, as we read the *Waterman* opinion, the Court was there merely explaining that, along with its exclusive and

final jurisdiction to determine the amount of excessive profits, the Tax Court also has exclusive (i.e., primary) jurisdiction to decide questions of its own jurisdiction that are collateral to and necessarily preliminary to that computation—, a result which involves no novel principle of law. *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

The fundamental error in the opinion below is its reading of "exclusive," as used in *Waterman*, as necessarily synonymous with "unreviewable."[14] It seems quite clear that this Court used "exclusive jurisdiction" in order to point out that the Tax Court, *rather than some other trial forum such as a district court,* has initial competence to pass upon these renegotiation questions. But the Court did not decide what would be the province of the constitutional courts once the Tax Court had rendered its decision. On the contrary, it reserved that problem, even for the district courts, by saying, "Whether it [the district court] ever can do so or not, it cannot *now* decide questions of coverage * * *" (emphasis added).

---

[14] The distinction between "exclusive" jurisdiction and "nonreviewable" jurisdiction is emphasized by cases such as *Knowles* v. *Hirsch*, 65 F. Supp. 690 (D. D.C.), holding that even constitutional contentions must first be presented to the Tax Court but that once that tribunal has ruled on those contentions appellate courts can review the rulings. See also *Wade* v. *Stimson*, 65 F. Supp. 277 (D. D.C.), affirmed, 331 U. S. 793.

Accordingly, there is no basis in *Waterman* for the inference by the division below of a necessary dichotomy between unreviewable questions of "coverage" (i.e. renegotiability of a contract or a contractor's business) and reviewable issues of the "jurisdiction" of the Tax Court. As the District of Columbia Circuit has decided in its prior cases (*infra*, pp. 24-30, 32-33), "coverage" can overlap and include "jurisdiction", so that while under *Waterman* the Tax Court must first pass on questions of coverage, this does not necessarily mean that, once the Tax Court has acted, its decision is not subject to appellate reexamination, at least insofar as it involves the Tax Court's jurisdiction over the subject matter of the case.

2. That this Court in *Waterman* intended to pass only on the power of a district court to grant relief prior to the termination of the administrative proceedings, and not on the scope of review of Tax Court decisions, is further demonstrated by the subsequent rulings in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, and *Lichter* v. *United States*, 334 U.S. 742, decisions which the opinion below completely overlooks. *Aircraft & Diesel*, like *Waterman*, involved a district court suit by a contractor seeking a declaratory judgment and injunction but, unlike *Waterman*, the agency renegotiation proceeding had been completed and a petition for redetermination was pending in the Tax Court. Again holding that the district courts were without jurisdiction to enter-

tain such a suit, this Court, in addition to explaining the *Waterman* case as involving solely the principle of exhaustion of administrative remedies (331 U. S. at 755), expressly distinguished between the statutory provision conferring exclusive original jurisdiction upon the Tax Court (*vis a vis* the district courts) in renegotiation matters and the provision concerning the finality of Tax Court decisions (331 U. S. at 768-769).[15] As to scope of the latter, the Court unequivocally stated (331 U. S. at 771):

> We do not express any opinion indeed we explicity reserve decision, upon the question of the finality of Tax Court decisions in these matters. * * *
>
> We are not forced in this case however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition. For it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to

---

[15] Only the first provision was mentioned in the *Waterman* opinion (see *supra*, fn. 13, p. 17). The second provision (also appearing in Section 403 (e) (1)) is that the "determination" of the Tax Court "shall not be reviewed or redetermined by any court or agency" (*infra*, p. 73).

> be put in motion but to be fully performed, before judicial intervention should take place at the instance of one in appellant's position.

In *Lichter*, where the defendant contractors sought to resist the Government's district court suits to recapture excessive profits as determined by the renegotiating agencies on the ground that such determinations were invalid, this Court, at the same time that it reaffirmed *Waterman* and *Aircraft & Diesel* by sustaining the exclusiveness of the Tax Court remedy, again distinguished the question of the finality of such Tax Court decisions and explicitly noted that it was not passing on that issue (334 U.S. at 791):

> No petitions were filed with the Tax Court in any of the cases before us, and the time for doing so has expired. Accordingly, here, as in *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771, we do not have before us, and we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made. We have only the situations presented by the respective failures of the petitioners to resort to the Tax Court in the face of the express statutory provisions made for such administrative relief.

It is thus quite plain that, contrary to the division below, this Court in *Waterman* and the later cases has merely affirmed the requirement of ex-

haustion of administrative remedies and has not passed on the "finality" to be accorded the Tax Court decision or the scope of appellate review of Tax Court rulings in renegotiation cases. That issue has three times been expressly reserved by this Court.

B. *The Decision Below Is Inconsistent with the Prior Rulings of the District of Columbia Circuit.*

Though the problem of review has been left open by this Court, it has been resolved for the District of Columbia Circuit by a series of rulings. The heart of the Government's complaint before this Court that the holding below is directly contrary to the prior decisions of the Circuit which have permitted review in cases such as this. The result is an unequal application of the law, precluding appellate scrutiny of the most important decision against the Government rendered by the Tax Court under the Renegotiation Act. If Tax Court renegotiation determinations are to be reviewable, as the court below has consistently held, there should be equality of treatment, for both Government and contractors, under the rules established by that court for the exercise of its appellate function.

1. The vital issue before the Tax Court was whether the Red Sea charter negotiations between respondent and the Maritime Commission (expressly named as a "Department" in Section 403 (a) of the Renegotiation Act, *infra*, p. 71) culmi-

nated in a "contract with the Department" within the meaning of Section 403(c) of the Act. If so, the renegotiability of that contract cannot be disputed. The Tax Court held that there was no contract with the Commission but only with the British Ministry of War Transport (R. 299-300). Relying on the District of Columbia Circuit's repeated holdings in some thirteen decisions since 1946 that it had authority to review constitutional and "jurisdictional" issues, and on that court's decisions defining "jurisdictional", the Government sought review of the Tax Court's ruling (R. 302-5).

The District of Columbia Circuit first held that it had authority to review Tax Court renegotiation decisions on "jurisdictional" questions in *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134 (1946).[16] The court held reviewable a decision of the Tax Court that the petition for review filed pursuant to Section 1142 of the Internal Revenue Code was filed too late to enable the Tax Court to take jurisdiction of the case. Referring to the "finality" provisions of the Act,[17] the court said (153 F. 2d at 136-7):

> We think, therefore, that the statute places exclusive and unreviewable jurisdiction in the

---

[16] *U. S. Electrical Motors* was the only pertinent case decided by the District of Columbia Circuit prior to the *Waterman* case. The several later cases were decided after *Waterman*.

[17] Section 403 (c) (1) of the Second Renegotiation Act: "* * * Upon such filing [*i.e.*, of a petition for redetermination

> Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, but that a ruling upon the jurisdiction of the Tax Court is untouched by that provision and, therefore, remains reviewable by this court.

The Tax Court was reversed and was ordered to hear the case and make the appropriate determination. A number of later decisions (see fn. 8, *supra*, pp. 12-13) repeat and reaffirm the rule, recognized in the opinion below (R. 336), that "in renegotiation cases it [the Court of Appeals] can review decisions of the Tax Court in respect to jurisdictional and Constitutional questions only." [18]

---

by the Tax Court], such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

[18] Since there is no constitutional issue involved here, we do not stop to discuss in detail the cases treating with review of constitutional points. It suffices to note that in *Blanchard Mach. Co.* v. *R. F. C. Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U.S. 912, the District of Columbia Circuit ruled that it could decide questions of constitutionality in the application of the Act and did so without serious objection from either side. It held that the retroactive application of the amendment of July 1, 1943, to subcontracts made with the Defense Plant Corporation was not unconstitutional, on authority of *Lichter* v. *United States*, 334 U.S. 742. On this issue, the case was reaffirmed in *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99, and again in *Warner & Swasey Co.* v. *War Contracts Price Adjustment Board*, 201 F. 2d 201. In the *Eastern* case, the court also held that renegotiation was not a taking of property without just compensation and that the reduction of profits was not unconstitutionally confiscatory in the absence of their complete elimi-

A survey of the decisions since 1946 reveals the type of issue which the court below has considered "jurisdictional" and therefore subject to review. *U. S. Electrical Motors, supra,* dealt with the contention that the contractor had delayed too long in invoking its Tax Court remedy. Similarly, jurisdiction over proper persons was held to be an appropriate issue for review in *Warner & Swasey Co.* v. *Board of Directors, R.F.C.,* 170 F. 2d 164, where the court decided that the correct successor in law to the Defense Plant Corporation was the Reconstruction Finance Corporation itself, rather than the directors of the R.F.C. or the members of its Price Adjustment Board, and accordingly ordered the Tax Court on remand to dismiss petitions pending against the directors and the members of the Board.

Of particular significance are several cases in which the District of Columbia Circuit has reviewed issues very closely analogous to, or indistinguishable from, that raised by the present case (all of which, under the terminology adopted by the panel below, might well be regarded as issues of the "coverage" of the Act). In *Maguire Indus-*

---

nation and was therefore not a deprivation of property without due process of law. In *Ring Construction Corp.* v. *Secretary of War,* 178 F. 2d 714, certiorari denied, 339 U.S. 943, the court ruled that the retroactive clause of the 1942 Act was not unconstitutional, again following *Lichter* v. *United States, supra.* Finally in *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board,* 195 F. 2d 198, the court held that in increasing the amount of excessive profits found by the Board, the Tax Court did not violate procedural due process.

tries v. *Secretary of War,* 185 F. 2d 434, the court ruled that the Act applied to determinations of the Tax Court in regard to proceeds received for part of a fiscal year, as well as those received for a whole fiscal year, and ordered the Tax Court to reinstate the petition it had dismissed. *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board,* 192 F. 2d 405, concerned the issue whether two companies were "under common control" for the purpose of applying the $500,000 war-business floor provision of Section 403(c)(6) of the Renegotiation Act, *infra,* p. 72.[19] The Court of Appeals held that the issue was one of "jurisdiction," subject to review (192 F. 2d at 407):

> * * * it is enough to say that in our opinion the determination that petitioner and Nichols & Co., Inc., were under common control was a determination of jurisdiction. It is clear that the finding of common control was requisite to the right of the Board to renegotiate any profits of this petitioner Company.

In the later case of *Armstrong* v. *War Contracts Price Adjustment Board,* 194 F. 2d 875, certiorari denied, 343 U.S. 967, the court held to be "jurisdictional" the question whether a particular salesman

---

[19] In general, the Act does not apply to contractors if "the aggregate of the amounts received or accrued in such fiscal year by the the contractor or subcontractor and all persons under the control of, or controlling or under common control with the contactor or subcontractor, under contracts with the Departments and subcontracts * * * do not exceed $500,000 * * *."

receiving commissions on sales by steel companies under contracts or subcontracts with the Government was a "subcontractor", as defined in Section 403(a)(5)(B) of the Act, *infra*, p. 71,[20] and therefore subject to renegotiation.

And in four cases the Court of Appeals has expressly reviewed issues of contract renegotiability, the precise type of question which the division below held not to be open to appellate scrutiny. In *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943, there was held reviewable not only the constitutionality of the Renegotiation Act, as applied to contracts entered into prior to its enactment in 1942, but also the issue of whether such contracts were covered by the Act, *i.e.*, their renegotiability under the Act as a matter of statutory interpretation.[21] See 178 F. 2d at 715. Similarly, in *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied,

---

[20] The Act defines "subcontract" as including "Any contract or arrangement * * * (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract. * * *"

[21] The review of the constitutional issue did not carry with it review of the Tax Court's construction of the statute, if the latter were not independently reviewable. As is the practice where this Court passes upon the constitutionality of a state statute in a case coming from a state court, the District of Columbia Circuit could have accepted the Tax Court's retroactive construction, if that were not independently reviewable, and considered the constitutionality of the Act on that basis.

339 U.S. 912; *Eastern Machinery Co.* v. *Under Secretary of War,* 182 F. 2d 99; and *Warner & Swasey Co.* v. *War Contracts Price Adjustment Board,* 201 F. 2d 201, certiorari denied, 345 U.S. 924, the District of Columbia Circuit reviewed "as jurisdictional" the renegotiability, under the 1943 amendment to the Act, of certain contracts with Reconstruction Finance Corporation subsidiaries which had been completed prior to the amendment's enactment in July 1943. As here, one of the issues passed upon in each case was the renegotiability of a contract said by the contractor not to be covered by the Act.

2. As this summary shows, the Court of Appeals has held "jurisdictional" the issues of whether the Government agency involved was a "Department" within the meaning of the Act (*Blanchard Mach. Co.; Eastern Machinery Co.; Warner & Swasey Co.,* II), whether the contract is one of a class that the Act subjects to renegotiation (*Ring Construction Corp.*), whether an exemption contained in the Act applies to the contract under consideration (*Lowell Wool*), and whether the renegotiated individual was a "sub-contractor" under the Act (*Armstrong*). In each instance the contractor urged that the whole of his Government business, or some particular contract or class of contracts, was not renegotiable under the Act—was beyond the reach of the renegotiating agency and (by the same token) of the Tax Court. In each case, the Court of Appeals held that it had competence to pass upon this

contention and then proceeded to render a determination on its merits. That is the precise situation now before the Court. Respondent claims that its Red Sea charter cannot be renegotiated because not made with a "Department", and the Tax Court has agreed. The prior decisions of the Court of Appeals plainly open wide the door for the Government's plea to review the Tax Court's ruling against renegotiability. See Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 433, 443-444 (July 1954).

It is true that the *Lowell Wool* opinion (*supra*, p. 28), appears, by way of dictum, to regard the issue of "common control" (in applying the $500,000 minimum requirement for renegotiability) as on a different plane for purposes of review than the "question whether a certain contract is within those to be renegotiated" (192 F. 2d at 407).[22] But *Armstrong* later held that the appellate court could determine whether certain of a salesman's commission agreements could be renegotiated as "subcontracts", and in *Ring, Blanchard, Eastern Machinery*, and *Warner & Swasey Co., II*, the

[22] It may be noted in passing that the *Waterman* case (*supra*, pp. 16-21) is discussed only in *Lowell Wool* and the instant case, although subsequent to *Waterman* the court below issued some 12 decisions on this general question. And while *Lowell Wool* seems to read *Waterman* as holding contract renegotiability to be an issue within the nonreviewable jurisdiction of the Tax Court, it also expressly recognizes that *Waterman* "rested upon failure to exhaust administrative remedies, and the Court, by one or two expressions, reserved decision upon the question of subsequent judicial review" (192 F. 2d at 407).

Court of Appeals deliberately decided for itself that certain contracts were "within those to be renegotiated." [23]

The truth is that there is no valid distinction between an issue such as "common control" and that of contract renegotiability. Both concern questions which must be answered before the renegotiating agency or the Tax Court can proceed to renegotiate the profits of a particular contractor or those derived from a particular contract. Both questions therefore involve "jurisdiction". *Lowell Wool* seems to suggest (192 F. 2d at 407) that the difference lies between a decision on power to recapture *any* profits at all from the contractor (*i. e.*, authority to renegotiate any of his contracts), and a ruling on the coverage of particular contracts once it has been decided that some of his business is within the Act. But this tentative demarcation of the boundary fails to take account of the other District of Columbia cases just mentioned (*supra*, pp. 24-30) in which the court did review the renegotiability of selected contracts, and certainly the suggestion has no force here where the Government relies on only one contract to establish its right to recapture excessive profits from respondent. Moreover, it does not make much sense to hinge reviewability on the fortuitous presence or absence of one concededly renegotiable agreement, which may be far outweighed in importance and amount by the disputed contract or contracts. The

[23] The opinion below does not refer to any of these five prior decisions.

proper criterion is simply whether the renegotiating agency or the Tax Court has power to consider the controverted contract or class of contracts in determining the contractor's excessive profits. That issue is one of jurisdiction over the subject matter which the Court of Appeals, under its own rulings, must and can consider.[24]

3. Buttressing the conclusion that the renegotiability of the Red Sea charters is jurisdictional, under the law developed and applied by the District of Columbia Circuit, is the line of cases in which that court has held a problem to be non-jurisdictional and therefore beyond its power to consider. In *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99, and *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Bd.*, 195 F. 2d 198, the court ruled that it would not consider any of the petitioners' allegations of error as to the Tax Court's computation of the amount of excessive profits.[25] The same ruling was made in *Ring Con-*

[24] The court's prior decisions make it clear that reviewability *vel non* does not turn on whether the appellate court has merely to decide issues of statutory interpretation in the abstract, or whether it has to consider particular findings and individual circumstances. In both *Lowell Wool* and *Armstrong*, the court considered and passed upon detailed and specific factual situations in deciding the questions of "common control" and "subcontract". Even in *Ring* and the *Blanchard* series, the rulings on the retroactivity of the Act and its amendments were not divorced from the particular circumstances before the court.

[25] In the *Eastern Machinery Co.* case, the question involved was the correctness of the Tax Court's refusal to allow as costs certain salaries paid out to corporate officers.

In *Knu-Vise*, the court refused to review a determination by the Tax Court that certain royalty payments were not deductible as costs.

struction Corp. v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U. S. 943.[26] The court also held in *Ring* that it would not review the Tax Court's decision as to burden of proof in its proceedings. In *Psaty & Fuhrman* v. *Stimson*, 182 F. 2d 985, and in *Keller* v. *United States*, 207 F. 2d 610, certiorari denied, 347 U. S. 918, the court ruled unreviewable the question of whether the Tax Court correctly decided that petitioners' accounts should be renegotiated on a completed-contract basis rather than on a fiscal year basis. Finally, in *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, the court overruled its prior decision in *Blanchard Mach. Co.* v. *R. F. C. Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U. S. 912, and held that it would not review a decision by the Tax Court that the Secretary of War had failed to follow proper procedure in not expressly mentioning a particular contract when commencing renegotiation proceedings against the company and hence had not complied with the statutory time limit requirement for the commencement of such proceedings.[27] See fn. 10, *supra*, p. 14.

---

[26] In *Ring*, the questions that the court refused to review concerned (a) the risks assumed by the contractor and the rate of profit it should fairly earn, (b) the costs the contractor could claim on account of certain payments to sub-contractors, and (c) the proper allowance for the contractor's state income tax.

[27] Although *Wunderlich* bears a superficial resemblance to *U. S. Electrical Motors*, *supra*, pp. 25-26, 27, because both cases involve time limit questions, the difference is actually substantial. The issue in *U. S. Electrical Motors* was whether the petition for review in the Tax Court had been filed on time;

In these decisions the Court of Appeals has marked out the category of questions of "law" which it early held in the *U. S. Electrical Motors* case (*supra*, pp. 25-27) were included in the unreviewable determinations by the Tax Court of the amount of excessive profits. Typical issues of law decided by the Tax Court which would appear not to be reviewable are rulings on the interpretation of the contract with respect to the allowability of certain costs, a conclusion on the legal relationship of certain parties to the contracts in order to determine whether payments to the former are properly allowable as salaries, or a ruling as to how much income tax must be paid under state law. Such problems, integral to the determination of proper costs and proper profits, are undoubtedly "legal" but they are not "jurisdictional."

The issue here is sharply different from those the court below has indicated are to be treated as

---

timely filing of a petition for review in the Tax Court under former Int. Rev. Code § 1142 is a jurisdictional prerequisite to Tax Court review. *Forest Glen Creamery Co.* v. *Commissioner of Internal Revenue*, 123 F. 2d 522 (C.A. 7); cf. *United States ex rel. Carey* v. *Keeper of Montgomery County Prison*, 202 F. 2d 267 (C.A. 3); *Slater* v. *Peyser*, 200 F. 2d 360 (C.A. D.C.). On the other hand, the decision of the Tax Court in *Wunderlich* related to the procedures before the Price Adjustment Board since there was no dispute as to when over-all renegotiation actually began. The issue was whether, in commencing renegotiation, the Board must notify the contractor expressly of each contract intended to be renegotiated, on pain of forfeiting its right to determine excessive profits. This question is a procedural one calling for an application of the Tax Court's expert judgment as to standards of fairness in Board relationships with contractors, and hence more clearly in the non-reviewable category.

non-jurisdictional. It is not one closely related to the computation of costs or profits; it does not require the use of judgment as to which costs are allowable or how much profits are excessive; it does not involve any difficult or technical questions of accounting theories or methods in which the Tax Court's expertise is essential; nor does it relate to mere matters of procedure either in the Tax Court or in the renegotiating agency. Rather, it is an issue going directly to the authority of both the administrative agency and the Tax Court to consider respondent's Red Sea charter and to render a decision that respondent did or did not receive excessive profits from that operation. That class of issue has, as we have shown (*supra*, pp. 24-31), been scrutinized in the past by the court below.

The Government is entitled to equality of treatment under the rules prevailing in the District of Columbia Circuit. It has the right to ask this Court to require the panel below to apply to this case the standards held to be controlling in the past and which will apparently continue to govern appeals heard by other divisions of the court. See *supra*, fn. 11, p. 14; cf. 13-14, 24-36.

II

There Is Good Ground for Sustaining Appellate Review by the District of Columbia Circuit of Constitutional and Jurisdictional Issues Arising from Tax Court Renegotiation Decisions.

Introductory: Thus far in this brief, we have urged that under the principles applied by the Dis-

trict of Columbia Circuit, which recognizes partial review of Tax Court renegotiation decisions, the Tax Court's holding in this case was plainly subject to appellate examination. Respondent may counter-attack by arguing that under the "finality" provisions of the Renegotiation Act there can be no review at all in the Court of Appeals, at least of non-constitutional issues. This Court, as we have already indicated (*supra*, pp. 16-24), has not as yet passed upon that contention. Admittedly, there is room for the argument we expect respondent to make. But it may be that the Court will prefer, at this autumn period of renegotiation litigation, to pretermit that question and to accept without independent examination the general principle, adopted by the court below, that despite the "finality" clause some control may be exercised on direct appeal from the Tax Court. On that view, the Court would content itself with delimiting and supervising the proper application by the Court of Appeals of its principles of review.

The Court may wish, however, to meet more directly the general issue of reviewability which it has thrice reserved. In that event, it is the Government's obligation to make its present position clear. At the beginning of renegotiation litigation and for some years, the Government urged on the courts of appeals, with diminishing force, the view that the "finality" clause of the Renegotiation Act (*infra*, p. 73) precluded any direct appellate review of Tax Court decisions, especially of non-constitu-

tional issues.[28] In the renegotiation cases heard by this Court (the last one was in November 1947), our position was, primarily, that the issue did not have to be reached, but, if it was, that there was probably no review in the courts of appeals, at least on non-constitutional issues.[29]

More recently, the Government has incidentally suggested, while opposing certiorari on the merits

---

[28] See *Waterman SS Corp.* v. *Land*, 151 F. 2d 292 (C.A. D.C.), reversed *sub nom. Macauley* v. *Waterman SS Corp.*, 327 U.S. 540; *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134 (C.A. D.C.); *Blanchard Mach. Co.* v. *RFC Price Adjustment Board*, 177 F. 2d 727 (C.A. D.C.), certiorari denied, 339 U.S. 912; *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U.S. 943; *Warner* v. *War Contracts Price Adjustment Board*, 188 F. 2d 363 (C.A. 9); *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560 (C.A. 9). After *U. S. Electrical Motors*, the issue was raised *pro forma* in the District of Columbia Circuit only in order to preserve it.

In the *Warner* and *French* cases, the Ninth Circuit held that Section 403(c) of the Renegotiation Act precluded direct appellate review of Tax Court renegotiation decisions. However, the court seems to believe that Tax Court decisions may be collaterally attacked in the district court suits brought by the Government to recapture the excessive profits. See fn. 9, *supra*, p. 13.

[29] See Brief for the Appellee, *Mine Safety Appliances Company* v. *Forrestal*, Oct. Term, 1945, No. 71, pp. 15, 27 ff; Brief for the Petitioners, *Land* v. *Waterman SS Corp.*, Oct. Term, 1945, No. 435, pp. 43 ff; Brief for the United States, *Lichter* v. *United States*, Oct. Term, 1947, Nos. 105, 74 and 95, p. 127. In *Aircraft & Diesel Equipment Co.* v. *Hirsch*, Oct. Term, 1946, No. 95, the Government's brief (p. 21) said only that, if the contractor were entitled to review of the Tax Court decision, the courts would be in a position to provide it, citing the *U. S. Electrical Motors* decision (*supra*, pp. 25-27, *infra*, pp. 43-44).

of some of the renegotiation cases sought to be brought here, that there may be no appellate review at all; the most recent such statement, in April 1953, was that "Although there are grounds which support" the position of the District of Columbia Circuit, "the arguments which may be advanced to the contrary are probably more persuasive."[30] For several years, however, the Government has not had occasion squarely to face the problem in this Court. This case presents the first opportunity.

We have reexamined the issue from the standpoint of 1955. It is now over eight years since the court below first declared in 1946, in *U. S. Electrical Motors* (*supra*, pp. 23-27, *infra*, pp. 43-44), the principles of review which have become established in that circuit. The Government's opposition, at that time, to the allowance of any review in the courts of appeals was largely based on the anticipated volume of appeals from thousands of Tax Court renegotiation orders, appeals which it was feared would result in clogging the courts and frustrating the Congressional purpose of speedy, expert, and efficient renegotiation.

---

[30] See Brief for Respondent in Opposition, *Blanchard Machine Co.* v. *RFC Price Adjustment Board*, No. 540, Oct. Term, 1949, at p. 9, n. 5; Brief for Respondent in Opposition, *Ring Construction Corp.* v. *Secretary of War*, No. 656, Oct. Term, 1949, at pp. 1, 3-4; Memorandum for Respondent in Opposition, *Martin Wunderlich Co.* v. *Secretary of War*, No. 666, Oct. Term, 1952, pp. 3-4. In *Keller* v. *United States*, Oct. Term, 1953, No. 538, the Government's Brief in Opposition, p. 16, fn. 7, merely reserved the right to make the argument, if certiorari were granted.

That fear has not materialized. There have been less than thirty appeals from the Tax Court,[31] and though more are in prospect the burden has not been heavy, either on the Court of Appeals or on the parties. The present Renegotiation Act has been extended for one year, but the peak of litigation in this field is undoubtedly past and it seems unlikely that future appeals can be many or burdensome. The limitation of review established in the District of Columbia Circuit[32]—described in Point I, *supra*, pp. 24-36, has, of course, tended strongly to diminish the number of appeals, and it will no doubt continue to do so. But at the same time this pattern has

---

[31] As noted above (*supra*, pp. 12-13), all but three appeals have been brought in the District of Columbia Circuit. The exceptions are the *French* and *Warner* cases, brought in the Ninth Circuit (see *supra*, p. 13, fn. 9), and *Ebco Mfg. Co.* v. *Secretary of Commerce* (C.A. 6, No. 12288). The latter appeal, which has not yet been argued or decided, and involves the same question of timely commencement of negotiation as *Wunderlich*, *supra*, pp. 14, 34, was brought in the Sixth Circuit in an attempt to avoid, if possible, the *Wunderlich* result. Ebco's original intention, as evidenced in its correspondence with the Department of Justice, was to seek review in the District of Columbia Court of Appeals.

In the *French* case, the Ninth Circuit held that if Tax Court renegotiation decisions were reviewable in a court of appeals the venue could be in the District of Columbia Circuit. The Government is making the same argument in *Ebco*.

[32] This pattern has recently been specifically approved by the Court of Appeals for the Sixth Circuit, in a case which did not come to it on direct review of a Tax Court decision. *Marie and Alex Manoogian Fund* v. *United States*, 212 F. 2d 369, 370. See also the *French* case, *supra* (182 F. 2d 560, 565); *United States* v. *Wissahickon Tool Works*, 200 F. 2d 936, 939 (C.A. 2). The *Ebco* case, fn. 31, *supra*, is a case of attempted direct review to the Sixth Circuit.

proven acceptable, as a practical matter, to both the Government and the general body of contractors concerned with renegotiation. Legislative developments since the Second Renegotiation Act (which was enacted in February 1944 and provided the Tax Court remedy) tend to indicate that Congress has also accepted such limited judicial review (see *infra*, pp. 66-68).

For these reasons, we hesitate to discuss the problem or to found our position solely on the materials and considerations which would have been dominant if this were still 1944 or 1946. The impact of the intervening history cannot be denied, and it would be rigidly doctrinaire to insist on ignoring it. In the light of the needs of the present and the future, we suggest that the Court may deem it inappropriate to set aside the general standards for review adopted by the District of Columbia Circuit, since objective analysis of the pertinent materials shows a reasonable basis for either position with nothing conclusive favoring either side. If anything, our present view is that the materials tend to support the result reached by the District of Columbia Circuit.

A. *The Statute*

Section 403(e)(1), incorporated by reference in subsection (e)(2), *infra*, pp. 73-75, provides that upon the filing of a petition for redetermination of excessive profits, the Tax Court

> shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such

> excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency.

It can, of course, be said that the language "and such determination shall not be reviewed or redetermined by any court or agency" affirmatively prohibits *all* review of Tax Court decisions. The words certainly permit that construction. But no court has ever read the language so broadly as to preclude all review. Even the Court of Appeals for the Ninth Circuit, which held in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, that this language prohibited direct appellate review, ruled that constitutional issues as well as certain other issues may be raised in the district courts (182 F. 2d at 565). See also *Brown & Williamson Tobacco Corp.* v. *United States*, 201 F. 2d 819 (C.A. 6); *United States* v. *Wissahickon Tool Works*, 200 F. 2d 936 (C.A. 2); *United States* v. *Bonnell*, 180 F. 2d 145 (C.A. 9); *Howell Electric Motors Co.* v. *United States*, 172 F. 2d 953 (C.A. 6); *Spaulding* v. *Douglas Aircraft*, 154 F. 2d 419 (C.A. 9). These decisions all necessarily contemplate only a limited finality, for raising such issues in the district courts would surely be contrary to the statutory prohibition against "review or redetermination by any court or agency" if that provision were read as broadly as possible. Compare Section 10(b), Administrative Procedure Act, 5 U. S. C. 1009(b). Indeed, since all (including the Government) have agreed that at least constitutional issues may be raised after a Tax Court redetermination (cf. *Lichter* v. *United States*, 334 U. S.

742, 789-793; see *infra*, pp. 62-63), it is clear that the "finality" clause cannot be interpreted as forbidding *all* review. The prohibition is neither self-revealing nor all-inclusive, and major clues to its scope must therefore be sought further in its wording and purpose, against the background of the general jurisprudence of review.

1. *The specific wording of the "finality" clause.*

(a). The key words in the clause are "determine", "determination", and "amount" of excessive profits. It is only a "determination" as to "the amount of excessive profits" which is unreviewable, and the Tax Court is only given "exclusive jurisdiction" to finally "determine" the "amount" of excessive profits. This formulation, in itself, gives substantial support to the District of Columbia Circuit's conclusion in *U. S. Electrical Motors v. Jones*, 153 F. 2d 134, that the intent was not to bar review of all aspects of Tax Court decisions, but only its "determination" of the "amount" of excessive profits (153 F. 2d at 136):

> It [the Act] very carefully says that the Tax Court shall have exclusive jurisdiction to determine the amount of excessive profits. It leaves untouched, by direct reference or otherwise, the remaining content of Section 1141(a) of the Internal Revenue Code.[33] We think, there-

[33] Section 1141(a) of the former Internal Revenue Code was the general provision giving the courts of appeals exclusive jurisdiction to review the decisions of the Tax Court. See *infra*, pp. 53-56, 75-76.

Similar provisions appear in Section 7482 of the new Internal Revenue Code, adopted in 1954.

> fore, that the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, but that a ruling upon the jurisdiction of the Tax Court is untouched by that provision and, therefore, remains reviewable in this court.

The phrase "determination of excessive profits", as well as its separate components, fit well with this conception of limited finality. The normal reading of the words would seem to be much narrower than that accorded to "decision" or "order", which, in addition to the "determination" of "excessive" profits, would seem to embrace rulings on other issues which might be raised and which, together with the excessive profit determination, go to make up a "decision" or "order".

This distinction between "determination", on the one hand, and "order" or "decision", on the other, appears to be drawn in the statute itself. Section 403(*e*)(1) declares:

> In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time prescribed in subsection (e)(1), such *order* shall be *final and conclusive* and shall not be subject to review or redetermination by any court or other agency. [Emphasis added.]

In addition to using somewhat stronger language ("final and conclusive") to indicate the non-re-

viewable status of orders of the Price Adjustment Board in the absence of exhaustion of remedies, Congress referred to the Board's "order", not its "determination", as being "final and conclusive". And Section 403(e), the Tax Court section, itself begins, "Any contractor or subcontractor aggrieved by an *order* of the Board *determining the amount of excessive profits* received or accrued by such contractor or subcontractor may * * * file a petition with The Tax Court of the United States for a redetermination thereof." [Emphasis added] Congress thus provided that it was to the "order" of the Board that was to be reviewed *de novo* by the Tax Court, not the "determination of the amount of excessive profits". This language suggests that the Tax Court is to undertake a complete examination of the Board proceedings by reviewing the entire Board order, including decisions on questions of jurisdiction which may underlie the order.

On the other hand, only the "determination" of the Tax Court, not its "order", was to be free from judicial review. One can properly infer that review is available for the other components of the "order", including decisions on "jurisdictional issues". The scheme of the Act would then be that all aspects of the renegotiating agency's decision would be reviewable by the Tax Court, while the Tax Court's decision could be reviewed by the courts of appeals only on issues not involved in the actual "determination of the amount of excessive profits".

(b). Moreover, "determination" is used several times in the statute, in its legislative history, and

in regulations issued under the Act as a word of art referring to the process of computation and to the use of expert judgment by which the amount of excessive profits in a contract or series of contracts is computed. Section 403(d) of the original 1942 Act specifies what costs shall not be allowed in "renegotiating a contract price or *determining* excessive profits" [emphasis added]. That section also makes other references to the powers of the Secretaries of the renegotiating departments with respect to accounting measures and computation of costs and reserves. Section 403(e)(3), added by the Revenue Act of 1942, 56 Stat. 982, refers to deductions and exclusions that must be allowed in "determining the excessiveness of profits realized." Subsections 403(a)(4)(B), (C), and (D), added by the Revenue Act of 1943, 58 Stat. 78, repeatedly use of the word "determination" with reference to computation of costs and use of accounting methods. Sections 403(c), (d) and (e) in the same amendment are of a similar nature. By contrast, those subsections dealing with questions of coverage or applicability of the Act do not use the word "determination"; *e.g.*, see subsection (h) defining certain profits and "termination date" and subsection (i) dealing with exemptions from the Act.

In testimony before a subcommittee of the Senate Committee on Finance, Under Secretary of War Robert P. Patterson frequently used "determine" in the narrow, accounting sense as did the Senators questioning him. *Hearings Before Committee on Finance on Section 403 of Public Law No. 528, 77th*

Cong., 2d Sess. 16-19. In discussing "determination" on the floor of the House, Representative Disney, chairman of the subcommittee of the Ways and Means Committee studying renegotiation, explained that the Act contained standards to aid in computing the amount of excess profits, using "determine" to mean "compute". 89 Cong. Rec. 9927; see also 89 Cong. Rec. 9944-5. The House, Senate, and Conference Reports on the Revenue Act of 1943 (containing the Second Renegotiation Act) also seem to use the term narrowly as synonymous with the process of computation. H. Rep. No. 871, 78th Cong., 1st Sess., 36, 37, 80-2; S. Rep. No. 627, 78th Cong., 1st Sess. 32, 104-6; H. Rep. No. 1079, 78th Cong., 2d Sess. 76-81.

The Regulations of the War Contracts Price Adjustment Board, promulgated under authority of the Revenue Act of 1943,[34] contained detailed explanations of how costs and profits were to be "determined". Parts 1604, 1605, 32 Code Fed. Regs. c. XIV (Supp. 1944). These explanations deal with what elements of costs were to be considered in defining excessiveness of profits, methods of payment, effect of taxes, and other like subjects. Earlier regulations such as those of the War Department Price Adjustment Board also defined "determination" of profits in terms of accounting principles.

---

[34] The Second Renegotiation Act established the War Contracts Price Adjustment Board as an over-all renegotiation agency for the future (see *Lichter* v. *United States*, 334 U.S. 742, 789). Previously, renegotiation was carried on by the individual agencies and departments, generally through their own Price Adjustment Boards (see *Lichter*, *supra*, p. 775).

War Department Price Adjustment Board, *Principles, Policy and Procedure to be Followed in Renegotiation*, pp. 14-17 (1942), see *Hearings Before Committee on Finance on §403 of Public Law No. 528*, 77th Cong., 2d Sess., p. 21. And in a *Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission*, submitted to the Committee on Ways and Means and to the Committee on Finance, and setting forth policies, principles, and interpretations of the original Act, "determination" was also explained in terms of computation methods and the use of judgment in establishing excess profits. See *Hearings Before the Committee on Ways and Means on H. R. 2324, H. R. 2698, and H. R. 3015*, 78th Cong., 1st Sess., p. 139; *Hearings Before Committee on Finance on §403 of Public Law No. 528*, 77th Cong., 2d Sess., p. 39.

In short, the relevant materials—statutory, legislative, and administrative—treat "determine" and "determination" as related specifically to costs, profits, amounts, computation, and business judgment.

(c). The term "amount" of excessive profits has a comparably restricted connotation. It, too, suggests a finding on costs and calculations, rather than a decision on the entire controversy. The Act does not give finality to the Tax Court's determination of the contractor's "liability" for recapture of excessive profits—a phrase which would more clearly endow the total decision with conclusiveness. Finality on "amount" seems to exclude the stages of decision prior to the actual study of business, financial, and related materials in the effort to reach

a figure representing excessive profits. Decision on whether or not to undertake that study at all in the particular case—the issue of "coverage"—would not be included.

We do not deny, of course, that it would be entirely reasonable to read the words "amount of excessive profits" more broadly. Our emphasis is that it is also entirely reasonable, and perhaps now more fully justified, to read them less widely as designed solely to protect the special expertise of the Tax Court, as the tribunal computing and appraising costs and profits, from encroachment by other officers and agencies, including the constitutional courts.

2. *Propriety of review by a constitutional court.*

Several general principles vie for place in appraising the meaning to be given the "finality" clause. On the one hand, there is the group of principles reflecting concern with unreviewed administrative rulings and stressing the right to review by a "constitutional" court. There is another body of doctrines, on the other hand, limiting review or appeal, whether the decisions be those of administrative agencies or of courts, to the instances specifically prescribed by the legislature.

Even if the Tax Court be viewed strictly as an administrative agency,[35] there is some support for

---

[35] The statute establishing it calls the Tax Court "an independent agency in the Executive Branch of the Government". Former 26 U.S.C. 1100; present 26 U.S.C. 7441; cf. *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 725; R. 328 (opinion of court below at earlier stage of this litigation).

a broad construction of the "finality" clause in the cases refusing to accord judicial review in an instance where the statute did not expressly so provide. See *e.g.*, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297 (right of union to services of Board); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (right to do business with Government); *Butte, A. & P. Ry.* v. *United States*, 290 U.S. 127 (right to receive subsidy); *United States* v. *Williams*, 278 U. S. 255 (widow's pension claim);[36] *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551 (whether special tax assessment should be made); *Eberlein* v. *United States*, 257 U. S. 82 (right to federal job); *Auffmordt* v. *Hedden*, 137 U. S. 310 (fixing of import duties); *Hadden* v. *Merritt*, 115 U. S. 25 (fixing value of foreign coins); *Dorsheimer* v. *United States*, 7 Wall. 166 (whether remission of tax penalty should be made); *Decatur* v. *Paulding*, 14 Pet. 497 (right to widow's pension).[37] Moreover, the

---

[36] But note the language that the decision is unreviewable "unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary and capricious." Compare *Reynolds* v. *United States*, 292 U.S. 443.

[37] These cases in which the Court has declined to imply review of administrative action seem to fall generally into two categories: (a) where the interests of the appellant, though enough to give him standing, were not sufficiently substantial to warrant the Court's interference with the administrative process in the absence of clear statutory authority (*Switchmen's Union*, *Perkins*, *Butte, A. & P. Ry.*, *Eberlein* and *Decatur*), and (b) where the administrative decision was one involving technical matters or broad statutory discretion unsuitable for judicial review (*Williams*, *Williamsport Rope*, *Auffmordt*, *Hadden*, and *Dorsheimer*).

Tax Court is a tribunal with "essentially judicial procedures and experience" (*Dobson* v. *Commissioner*, 320 U. S. 489, 498; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 769), and some reliance can be placed on the rule that no appeal need be provided from the decision of a trial court.[38]

But as countervailing weights there are the many instances in which this Court has held action by an administrative agency to be subject to some measure of judicial scrutiny even in the absence of express statutory authorization.[39] For instance, in *Estep* v. *United States*, 327 U. S. 114, a draft case, where the statute not only failed to provide for review but expressly made the administrative decision "final",[40] the Court nevertheless ruled that the Selective Service System's decision may be reviewed to ascertain whether the agency acted within its authority. See also the cases cited in *Estep*, 327

---

[38] In our view, there would be no constitutional barrier to interpreting the "finality" clause as precluding all review, at least on non-constitutional questions. See the cases cited in the text, also *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 76-82 (Brandeis J.); *Crane* v. *Hahlo*, 258 U.S. 142; *Hilton* v. *Merritt*, 110 U.S. 97; *Passavant* v. *United States*, 148 U.S. 214; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502.

[39] *E.g.*, *Order of Railway Conductors* v. *Swan*, 329 U.S. 520; *Board of Governors* v. *Agnew*, 329 U.S. 441; *Estep* v. *United States*, 327 U.S. 114; *Stark* v. *Wickard*, 321 U.S. 288; *Shields* v. *Utah Idaho C. R.*, 305 U.S. 177; *Reynolds* v. *United States*, 292 U.S. 443; *Lipke* v. *Lederer*, 259 U.S. 557; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U.S. 163; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94.

[40] In *Heikkila* v. *Barber*, 345 U.S. 229, 233, the Court indicated the ambiguity inherent in "final".

U. S. at 123, fn. 14; *Heikkila* v. *Barber*, 345 U. S. 229; *Dickinson* v. *United States*, 346 U. S. 389.[41] And in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369, the Court apparently regarded as settled the rule that "[a]n agency may not finally decide the limits of its statutory power. That is a judicial function."

However, we need not attempt to balance the various decisions and groups of decisions because, as the Court recently declared in applying Section 10 of the Administrative Procedure Act (*Heikkila* v. *Barber*, 345 U. S. 229, 233):

> Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it.

As we have shown (*supra*, pp. 43-49), close examination of the words of the Renegotiation Act and of the "finality" clause reveals good textual support for the general policy followed by the District of Columbia Circuit. In a later section of this brief, we discuss the bearing of the somewhat equivocal legislative history. *Infra*, pp. 56-68. We cannot now say that the purpose of renegotiation will be thwarted or its efficient administration

---

[41] Of course, the *Estep* and similar cases involved personal liberty.

impeded by limited appeals. Certainly, the interests on both sides are important enough to merit, even if they do not require, the preventive and curative hygiene of appellate review.[42]

3. *Mechanism for court review.*

There are, as we have pointed out, good grounds in the Renegotiation Act for holding that Congress did not bar a substantial measure of judicial review. How is this to be obtained? In the absence of a specific review provision in the Act, the District of Columbia Circuit reads Section 1141(a) of the former Internal Revenue Code (Appendix, *infra*, p. 75), providing for appellate review of Tax Court decisions, as carrying over (to the extent left open by the "finality" clause) to Tax Court decisions in renegotiation cases. See *supra*, pp. 43-44. Although it is in the Internal Revenue Code, Section 1141(a) provides generally for review of Tax Court decisions, and is not in terms limited to rulings in tax cases; the Internal Revenue Code establishes, and contains all of the various provisions relating to, the Tax Court.

Section 403(e)(1) of the Renegotiation Act, *infra*, pp. 73-74, enumerates certain sections of the Internal Revenue Code which are made applicable in renegotiation proceedings, thereby suggesting at least a limited carry over between the two areas of

---

[42] Over $11 billion of taxpayers' money has been recovered under the 1942 Act. *Final Report of War Contracts Price Adjustment Board*, Table II (1951). Other interests may also be affected. For example, a decision that there can be no judicial review might discourage contractors from doing business with the Government.

Tax Court business. This argument, however, was regarded by the Ninth Circuit in the *French* case (182 F. 2d at 561-562, *supra*, pp. 13, 38, 40) as undermined by the non-inclusion of Section 1141(a) in the list, a consideration which the Ninth Circuit regarded as significant. But since the sections enumerated are all concerned with administrative or procedural matters within the Tax Court, it may very well have been considered inappropriate to include a provision relating to appellate review.

A further argument advanced against the limited carryover of Section 1141(a) is that such a carryover also requires, of necessity, application of the venue provisions of former Section 1141(b) of the Internal Revenue Code, *infra*, pp. 75-76.[43] This adjustment, it is urged, is awkward and inappropriate, since in renegotiation there is no action by a "collector," no "return of the tax in respect of which the liability arises," no "Commissioner", and no "taxpayer." As stated in *French* (182 F. 2d at 562), "'* * * the venue provisions were never made to fit a review or appeal as to renegotiation actions because there never was a 'substantive right of appeal' conferred upon the courts of appeals to 'nullify.'"

---

[43] Section 1141(b) provides in pertinent part:

(1) * * * Except as provided in paragaph 2, such decisions may be reviewed by the court of appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

The answer to this argument may lie in the following considerations. First, Section 1141(b)(1) goes on to provide that "if no return was made, then [the decision may be reviewed] by the United States Court of Appeals for the District of Columbia". Since there is no "return" in renegotiation, this provision can easily be held applicable. It is not uncommon or unusual in litigation against the Government or an official that the action may be maintained only in a court located in the District of Columbia, and there is nothing particularly awkward or inconvenient in limiting review of Tax Court renegotiation decisions to the District of Columbia Circuit. Second, the Renegotiation Act of 1948 (which has since expired) expressly provided for broad judicial review of Tax Court decisions on all matters of fact and law in renegotiation cases. Section 3(e), 62 Stat. 259, 50 U. S. C. App. 1193(e).[44] Yet that Act made no change in the venue provisions of Section 1141(b), but expressly incorporated it. At least in 1948, Congress did not believe that the venue provisions of Section 1141(b) were useless for renegotiation cases. Third, as we show *infra*, pp. 56-57, 62-63, it was assumed by

---

[44] The review provided in subsection (e) of the 1948 Act is much broader than is possible under the 1942 Act, as construed by the District of Columbia Circuit. Under the later provision not only were the decisions of the Tax Court on questions of jurisdiction and constitutionality reviewable but decisions on questions of law concerning the determination of the amount of excess profits itself were reviewable as were findings of fact if not supported by substantial evidence on the whole record. See *infra*, p. 60.

members of Congress and other government officials at the time the Renegotiation Act was considered, enacted, and amended, that there would be judicial review of the Act on constitutional questions. Despite that recognition, no venue provisions other than Section 1141(b) were added to the Act.

There is another reason for holding Section 1141(a) applicable. If the choice is between direct review, as held by the District of Columbia Circuit, and indirect review in district courts, as suggested by the Ninth Circuit, we believe that the procedure adopted by the District of Columbia Circuit would be much more desirable. Not only would direct review make for more orderly judicial administration, but it would result in its most expeditious and efficient disposition of the litigation, in accordance with the Congressional policy in renegotiation matters. See *Lichter* v. *United States,* 334 U. S. 742, 791-2; S. Rep. No. 10, Pt. 5, 78th Cong., 1st Sess. 1-3; H. Rep. No. 871, 78th Cong, 1st Sess. 34-6. Centralizing review in the Court of Appeals at the seat of Government is preferable to dispersal of litigation throughout the various judicial districts, with further opportunity for appeal to ten different courts of appeals.

B. *Legislative History*

1. Like its language, the legislative history of the Renegotiation Act provides no clear-cut answer as to the extent Tax Court decisions in renegotiation cases are to be open to judicial scrutiny. In exam-

ining this legislative history it is important first to note that, although there was no provision in the Act for any review of the determinations of the renegotiating departments until the enactment, on February 25, 1944, of the second Renegotiation Act (in the Revenue Act of 1943) which provided the Tax Court remedy, it was often assumed during the prior period that judicial review could be obtained of decisions of the various Secretaries in the same manner that judicial review could have been obtained of any other administrative decision. See *Hearings Before House Committee on Naval Affairs Pursuant to H. Res. 30,* 78th Cong., 1st Sess., pp. 433, 517. At least one such case was in fact brought before enactment of the Revenue Act of 1943, *Lincoln Electric Co.* v. *Knox,* 56 F. Supp. 308 (D. D. C.), but while it was pending the new Act became law and the suit was dismissed for failure to exhaust the Tax Court remedy. 77 F. Supp. 444 (D. D. C.), affirmed *sub nom Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841, on the authority of *Lichter* v. *United States,* 334 U. S. 742.

In the legislative history of the 1943 Act (the Second Renegotiation Act), there is a complete absence of any express reference, pro or con, to the issue here presented. The Tax Court provision first appeared in the Revenue Bill as it was reported by the House Ways and Means Committee. The Committee's report (H. Rep. No. 871, 78th Cong., 1st Sess., pp. 76 and 77) noted the absence in the then existing law of provisions for reviewing

decisions of the renegotiating departments, commented on the provision for Tax Court redetermination, noted, in the language of the "finality" clause as finally enacted, that the jurisdiction of the Tax Court was exclusive and its determination of amounts final, pointed out the advantages of *de novo* redeterminations, and explained the details of the procedure. No reference, however, was made to the question of whether the *de novo* decisions of the Tax Court were to be subject to judicial review. Nor was the problem mentioned on the floor of the House, where the Tax Court provisions were debated in detail (89 Cong. Rec. 9928-9, 9935-6).

The Senate Finance Committee held extensive hearings on the House bill and particular attention was given to the provision for Tax Court reconsideration of administrative determinations of excessive profits. Various government representatives argued that to place this work with the Tax Court would overburden that tribunal and that the Court of Claims should be substituted as the redetermination forum; this proposal for substituting the Court of Claims for the Tax Court was discussed at length, again without any mention of review of Tax Court decisions under the House version. *Hearings Before the Senate Committee on Finance on H. R. 3687*, 78th Cong., 1st Sess., pp. 49, 386, 613, 990, 999, 1000, 1015, 1016, 1017, 1026, 1028, 1032, 1070. Agreeably to these suggestions, the bill reported by the Senate Committee substituted the Court of Claims for the Tax Court as the forum for

de novo redeterminations of excessive profits. S. Rep. No. 627, 78th Cong., 1st Sess., pp. 34, 109-110.

On the floor of the Senate the entire question of Court of Claims versus Tax Court proceedings was fully debated, still without any express statement whether there was to be judicial review of Tax Court decisions. (90 Cong. Rec. 505-6, 531-5). During these debates, an amendment was proposed to substitute for *de novo* redetermination by the Court of Claims the more usual "substantial evidence" type of judicial review, and further expressly to provide for certiorari from the Court of Claims to this Court. 90 Cong. Rec. 531. This amendment was rejected (90 Cong. Rec. 535), but the discussion (90 Cong. Rec. 531-535) reveals that the reason for the rejection was that under the substantial evidence type of review the War Contracts Price Adjustment Board would have to keep a formal record of its proceedings; no objection was expressed to the specific provision for Supreme Court review of the Court of Claims' redetermination. The Senate passed the bill as recommended by the Finance Committee.

In conference, however (H. Rep. No. 1079, 78th Cong., 2d Sess.), the Court of Claims provision was eliminated and the Tax Court provision reinstated without any mention of whether the Tax Court's decision was to be open to appellate scrutiny, as the Court of Claims' redeterminations would have been. Further congressional debate in the Senate (90 Cong. Rec. 1300-1), and in the House

(90 Cong. Rec. 1338-9, 1351, 1355), again failed to refer to the problem.

2. This absence of any mention of judicial review of Tax Court decisions permits, of course, the inference that Congress intended no review. Such an inference gathers some support from the further circumstance that in 1945, when hearings were held on a proposed one-year postponement of the termination date of the Renegotiation Act, Mr. E. C. Alvord, testifying on behalf of the United States Chamber of Commerce, suggested that the Act be amended to provide explicitly for judicial review of Tax Court determinations. *Hearings Before the Committee on Ways and Means on H. R. 2628,* 79th Cong., 1st Sess., pp. 174-176. A similar suggestion was made by the National Association of Manufacturers. Hearings, *supra,* at p. 222. But when the extension was enacted, 59 Stat. 294, no such amendment was included. Again in 1951, when the Renegotiation Act of 1951 was being considered,[45] the National Association of Manufacturers and the United States Chamber of Commerce both suggested that an express judicial review provision be included in the 1951 Act similar to the one included in the 1948 Act.[46] *Hearings Before the Committee on Ways and Means on H. R. 2946,* 81st Cong., 2d Sess. p. 226; *Hearings Before*

---

[45] The Act now in effect is an extension of the 1951 Act.

[46] See *supra,* fn. 44, p. 55 for discussion of the 1948 review provision which made Tax Court renegotiation decisions under that Act fully as reviewable as Tax Court tax rulings.

Committee on Finance on H. R. 1724, 82d Cong., 1st Sess. p. 71. And on the floor of the House the belief was expressed that the bill should expressly provide for full appeals from the Tax Court (97 Cong. Rec. 586, 594), but once more the Act became law without such a provision.

Although Congress' refusal to accept the suggested amendments for full judicial review could be interpreted as showing Congressional desire that there be no judicial review of any kind under the Renegotiation Act, there are several other interpretations which are equally reasonable. Here, as in every case in which Congress fails to enact a suggested provision in a statute without explanation in debates, reports, or hearings, it is impossible to conclude with any degree of certainty why the omission occurred. It might have been based on a belief that the full appeal provision was undesirable, or on a belief that the matter of appeal is adequately taken care of by the limited review provided by the existing legislation, as interpreted in the District of Columbia. Congress may have refused to add the suggested provision to the 1951 Act because it believed that full judicial review of Tax Court determinations, such as was provided in the 1948 Act, might unnecessarily clog court dockets with extremely complicated cases necessitating judicial examination of huge records, and might result in substitution of judicial judgment for that of the expert Tax Court. Indeed, by reenacting the language of Section 403(e)(1) and its "finality" clause in the 1951 Act, Congress may

have specifically intended to provide a limited appellate review, which, as Congress knew (see *infra*, pp. 66-67), the District of Columbia Circuit had accorded under the same language as it appeared in the earlier Act.[47]

3. While these are materials in the legislative history which might be read as revealing a Congressional purpose against judicial review of Tax Court renegotiation decisions, the same history also contains evidence indicating that Congress understood that there would be at least a limited judicial review. For example, on several occasions various members of Congress plainly assumed that there would be judicial review of Tax Court decisions on constitutional questions, notwithstanding the language of the "finality" clause of Section 403(e). Discussions on the floor of Congress contain a number of references to the review of the statute by this Court, together with a concern whether the Court would hold certain provisions to be unconstitutional. 89 Cong. Rec. 9929-9930 (discussion by Representative Disney, Chairman of the Subcommittee which investigated renego-

[47] That this may be the explanation is suggested by a colloquy in a committee hearing among Representatives Curtis and Camp, Mr. Frank L. Roberts, then Chairman of the Military Renegotiation Policy and Review Board (now a member of the Renegotiation Board), and Mr. Barron K. Grier, Counsel for the Military Renegotiation Policy and Review Board, explaining that a right of appeal from decisions of the Tax Court exists under the general review section, Section 1141, of the Internal Revenue Code. *Hearings Before Committee on Ways and Means on H.R. 2946*, 81st Cong., 2d Sess. p. 18. This undoubtedly has reference to the holdings of the District of Columbia Circuit.

tiation), 9934-5, 9944. And this Court and several courts of appeals have undertaken to decide constitutional questions raised under the Renegotiation Act without regard to the prohibitions of Section 403(e).[48]

There is also some evidence of Congressional recognition that Tax Court renegotiation decisions would be subject to appellate review on nonconstitutional questions, notwithstanding Section 403(e). Representative Vinson, Chairman of the Committee on Naval Affairs and one of the leading proponents of renegotiation, explained on the House floor that subsection (e), which establishes the Tax Court remedy, was being added to the Act not to limit any preexisting right of judicial review but rather to make it perfectly clear that Congress intended that there should be a right of appeal from the renegotiating agency's order. He explained that the only difference among members of the Committee was as to whether the initial review should be *de novo* or on the record. 89 Cong. Rec. 9936. Later, when the Renegotiation Act of 1951 was being considered, a representative of the United States Chamber of Commerce stated to

---

[48] *Lichter* v. *United States*, 334 U.S. 742; *Lincoln Electric Co.* v. *Forrestal*, 334 U.S. 841; *United States* v. *Bonnell*, 180 F. 2d 145 (C.A. 9); *Howell Electric Motors Co.* v. *United States*, 172 F. 2d 953 (C.A. 6); *Spaulding* v. *Douglas Aircraft*, 154 F. 2d 419 (C.A. 9); *Blanchard Machinery Co.* v. *R.F.C. Price Adjustment Board*, 177 F. 2d 727 (C.A. D.C.), certiorari denied, 339 U.S. 912; *Ring Construction Co.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943; see *Marie and Alex Manoogian Fund* v. *United States*, 212 F. 2d 369, 370 (C.A. 6).

those members of the Senate Committee on Finance who had been members of the Conference Committee on the Revenue Act of 1943 that they thought they had provided for an appeal from the Tax Court under that Act, but that explicit appeal provisions had erroneously been left out. *Hearings before Committee on Finance on H. R. 1724,* 82nd Cong., 1st Sess., p. 71. No committee member challenged this statement.

Some further indication in the legislative history of the Revenue Act of 1943 that Section 403(e) was primarily intended to prohibit review of the *computation* of excessive profits appears in the Congressional discussion of the reasons for designating the Tax Court as the forum for redetermining excessive profits. In explaining those reasons, Congressman Disney, one of the floor leaders in the enactment of the bill, stated that the Tax Court was chosen because it had dealt with similar problems of defining excessiveness of profits under the excess profits tax and because the standards for the determination of excessive profits were too general and too flexible to be applied by an appellate court. 89 Cong. Rec. 9929. Similarly, during the debates on the amendment proposed in the Senate to substitute "substantial evidence" review for the *de novo* provision (see *supra*, pp. 58-59), the opposition made plain that determination of excessive profits involved the use of broad discretion and expert judgment and therefore was of a type not suitable for judicial examination. 90 Cong. Rec. 532, 533. Comparable discussion emphasizing the discretionary nature of determinations of excessive

profits, the dangers of the abuse of that discretion, and the consequent need for review by an expert body, such as the Tax Court, appears at 90 Cong. Rec. 1353-4, 89 Cong. Rec. 9927-8, 9934, 9944-5, and see 88 Cong. Rec. 3584. In addition, several times during committee hearings it was emphasized by witnesses and by committee members that exclusive *de novo* review power should be placed in an expert body to protect contractors from arbitrary decisions by the Price Adjustment Board, constitutional courts being said to be hampered by an inability to set aside determinations made pursuant to a statutory grant of broad discretion. For example, see *Hearings Before Senate Committee on Appropriations on H. R. 6868,* 77th Cong. 2d Sess., pp. 35-40, 85-7.[49]

---

[49] In discussing renegotiation during the debate on the 1951 Act, Representative Vinson stated (97 Cong. Rec. 588):

> Renegotiation is not an exact science. There is no fixed formula or yardstick for the determination of excessive profits, nor is there any fixed maximum to the amount of profits which may be realized or retained by any contractor. The present bill is patterned closely after the wartime renegotiation statute, which also formed the basis for the act of 1948. In it, as in those prior acts, renegotiation remains entirely a judgment operation. It has been successful as such. The bill lays down certain factors, virtually the same as those formerly prescribed, which must be taken into consideration by the renegotiation authorities in determining in every case whether excessive profits exist, and if so, in what amount. Beyond this there are no curbs imposed in the bill upon the officials to whom are granted the authority to make final determinations of excessive profits, subject only to review in the Tax Court of the United States.
>
> This freedom of discretionary action is the outstanding characteristic of the whole technique of renegotiation as it has been developed to this time. It provides at once its greatest virtue and its clearest warning. * * *

The concern thus manifested by Congress for protecting the contractor from arbitrary use of the discretionary power granted by the statute to the Secretaries and to the War Contracts Price Adjustment Board, coupled with the conviction that constitutional courts could not appropriately review such discretionary determinations, strongly suggests that Section 403(e)'s "finality" provision was directed not at barring judicial scrutiny of Tax Court decisions of "jurisdictional" or "coverage" questions arising under the statute, but rather at precluding judicial reexamination of the Tax Court's exercise of discretion or expert judgment in determining the amount of excessive profits.

4. Although the history of subsequent legislation is often of little value in interpreting an act (cf. *Fogarty* v. *United States,* 340 U. S. 8, 13-14), it is helpful in this case to examine the history of the Renegotiation Act of 1951, 65 Stat. 7, 50 U. S. C. 1211-33, because the clauses limiting review in the 1942 Act (as amended) and the 1951 Act are identical. Section 108 of the 1951 Act (50 U. S. C. App. 1218) continued in *haec verba* the language of Section 403(e), notwithstanding the District of Columbia Circuit's exercise of appellate jurisdiction to review questions of jurisdiction and constitutionality. As appears from the hearings, the Committee was aware of the interpretation followed by the District of Columbia Circuit. *Hearings Before Committee on Ways and Means on H. R. 2946,* 81st Cong., 2d Sess., p. 18; see fn. 47, *supra,* p. 62. Nowhere in the legislative history of the 1951 Act was

there expressed any disapproval of the Circuit's exercise of jurisdiction nor was it suggested that the 1951 Act be "tightened up" to foreclose this type of review under Section 108 of that Act. A search of the Congressional Record also reveals that no bill to override the District of Columbia Circuit's approach was ever introduced from 1942 until 1951.

The 1951 Act also contains internal evidence of Congressional recognition that the courts could and would review certain limited questions under that Act. Section 106(a)(6) (50 U. S. C. App. 1216(a)(6)), providing for exemption of certain contracts, prohibits review of any regulations issued, or determinations made, under that section "notwithstanding section 108," the section which continues verbatim the language of Section 403(e)(1) of the earlier Act (including the "finality" provision). Also, Section 106(a)(8), added by Public Law 764, 83d Cong., 2d Sess., contains a similar proviso with respect to certain Board findings.[50] The inclusion of such provisions suggests a Congressional recognition of the necessity of providing that a "finding" or "regulation" or determination of a particular kind not be reviewed in

[50] It will be noted that both of these provisos are consistent with the theory that Congress intended to foreclose review over matters of broad discretion and judgment or matters of accounting only. Subsection (a)(6) precludes review of a discretionary determination that contracts are or are not directly connected with national defense. Subsection (a)(8) forbids review of findings by the Board that competitive conditions affecting sale of certain articles will or will not reasonably prevent excessive profits.

order to foreclose judicial review, even though there exists the general provision forbidding review of the Tax Court's "determination" of the "amount" of excessive profits.

C. *Scope of review*

If there is good ground, as we suggest, for sustaining a limited review of Tax Court renegotiations decisions, is the formulation previously adopted by the District of Columbia Circuit (which we consider in Point I, *supra*, pp. 24-36) an adequate one? Marking the limits of review by reference to "jurisdictional" issues has been attacked as supplying too indefinite boundary lines (Davis, *Unreviewable Administrative Action*, 15 F. R. D. 433, 444 (July 1954)), but it is only the rubric "jurisdictional" which is too ambiguous, not the substance of what is done in its name.

As our discussion in Point I shows, there are two general categories of issues in renegotiation cases. One group includes the questions directly involved in the appraisal of costs, profits and business operations. Because such issues are integral to the "determination" of the "amount" of "excessive profits" they cannot be reviewed by the Court of Appeals, whether they be of law or of fact. In the other general class are the so-called "jurisdictional" issues—the questions which must be answered before the Tax Court can begin to consider the contractor's costs, profits, or operations, in an

effort to determine whether his profits were excessive. In one such case, the issue may be whether the contractor is subject to renegotiation because of his business, taken together with others under "common control", exceeds the statutory minimum of $500,000. *Supra*, p. 28. In another instance, the "jurisdictional" question may be whether the contractor is a "subcontractor", as defined in the Act, and therefore subject to renegotiation. *Supra*, pp. 28-29. Here, the issue is the renegotiability of respondent's Red Sea charter. Before the Tax Court could determine the amount of respondent's excessive profits on that contract, it first had to decide whether the contract was under the Act.

This division of issues is workable. It follows the text of the "finality" clause. *Supra*, pp. 43-49. Above all, it accords with the primary purpose of the "finality" clause, as revealed by its legislative history (*supra*, pp. 62-66), to protect the judgment of the Tax Court, expert in appraising cost and financial data, in those fields in which it has acquired special competence as a tax tribunal. Though presented with the opportunity, Congress has not upset the District of Columbia Circuit's formulation. For all these reasons, we believe that there is no occasion at this time to seek to create a new demarcation of reviewable issues.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals

should be reversed and the case remanded to that court for a ruling as to the correctness of the Tax Court's decision that respondent's contract is not renegotiable.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
OSCAR H. DAVIS,
Special Assistant to the Attorney General.
MELVIN RICHTER,
JULIAN H. SINGMAN,
Attorneys.

DECEMBER, 1954.

APPENDIX

1. The Renegotiation Act of 1942, 56 Stat. 245, as amended, 50 U.S.C. App. 1191, *et seq.*, provides in pertinent part:

> Sec. 403 (a). For the purpose of this section—
>
> (1) The term "Department" means the Department of the Army, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.
>
> * * * * *
>
> (5) The term "subcontract" means—
>
> * * * * *
>
> (B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, * * *

* * * * *

Sec. 403 (c) * * *

(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted unded subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B)) do not exceed $500,000 and under subcontracts described in subsection (a)(5)(B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

* * * * *

Sec. 403 (e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before The Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of di-

visions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermina-

tion thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

2. The pertinent provisions of former Section 1141 of Title 26, U. S. C., 1952 ed., the Internal Revenue Code, are as follows:

(a) *Jurisdiction.*

The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

(b) *Venue—(1) In general.*

Except as provided in paragraph 2, such decisions may be reviewed by the court of appeals for the circuit in which is located the collector's office to which was made the return of the tax

in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

(2) By agreement.

Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any court of appeals, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

(3) Application of subsection.

This subsection shall be applicable to all decisions of the Tax Court rendered on and after May 10, 1934, and section 1002 of the Revenue Act of 1926, 44 Stat. 110, as in force prior to May 10, 1934, shall be applicable to such decisions rendered prior thereto, except that paragraph 2 of this subsection may be applied to any such decision rendered prior to May 10, 1934.

☆ U. S. GOVERNMENT PRINTING OFFICE 1934 328671 789